Kentucky Law Journal

Volume 55 | Issue 3 Article 9

1967

Criminal Law--Homicide--Murder--Manslaughter--Retrial for Manslaughter on Evidence of Murder

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matter of realistic ethics. It is well established that an accused is entitled to representation regardless of the offense.[25] This right is not superficial, but one of substance.[26] If such a right exists for the accused, a duty falls upon the attorney appointed by the court to represent the accused in a capable manner. In the past, decisions have been reversed where either the trial court or the court-appointed counsel was delinquent in executing its duties.[27] Such action tends to indicate that the Supreme Court of the United States and the highest courts in the several states are concerned with adequate representation of the indigent accused. This process without compensation may, however, be economically burdensome, at times so great as to endanger the lawyer's career.[28]

A comprehensive program which would afford adequate representation in criminal actions is overdue in this state. We must be realistic in our appraisal of the legal profession. While it may be that every member of the bar proclaims his readiness to serve as counsel for indigents, the courts, for various reasons, tend to appoint recent graduates. Such experience is good for the young attorney, but it does not always give the best protection to the accused. In relation to the magnitude of the problem of representing indigents in criminal proceedings, few law students are inclined to enter the area of criminal law when a livelihood is not available in such a practice. Thus, we find ourselves in a vicious circle; recent graduates with little interest in criminal law are appointed to represent the indigents; due to their superficial interest, the defense is inadequate. In some moral sense, this situation may be deplorable, but in reality it exists and will continue until action is taken either by the Court or the Legislature to provide stimulus for lawyers to take a personal interest in representing the indigent accused.

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CRIMINAL LAW — HOMICIDE — MURDER — MANSLAUGHTER — RETRIAL FOR MANSLAUGHTER ON EVIDENCE OF MURDER.—At the first trial for murder of his wife, defendant was convicted of voluntary manslaughter. The evidence, while possibly supporting defendant's theory of suicide, did not show any mitigating circumstances which would have allowed a

[25] Miranda v. Arizona, 384 U.S. 436 (1966).
[26] Johnson v. United States, 110 F.2d 562 (D.C. Cir. 1940).
[27] Curry v. Commonwealth, 390 S.W.2d 891 (Ky. 1965); Rayon v. State, 267 S.W.2d 153 (Tex. 1954).
[28] Comment, 16 HASTINGS L.J. 274 (1964).

reduction to voluntary manslaughter. The jury was instructed to decide whether there had been a homicide, and if so, whether defendant was responsible. Because the instructions were ambiguous, a reversal and new trial were granted. At the second trial, on an indictment of voluntary manslaughter, the commonwealth presented the same evidence. The defendant then demurred, claiming that such evidence would not support a conviction of voluntary manslaughter, since the element of mitigating circumstances was not shown. The trial court sustained the demurrer, which was appealed. *Held*: Reversed. For the protection of society from dangerous criminals, a defendant convicted of voluntary manslaughter on a murder indictment by evidence indicating murder without provocation may on retrial be acquitted only by the jury, and not released on demurrer. *Commonwealth v. Frazier*, 420 Pa. 209, 216 A.2d 337 (1966).

The criminal procedure established by this decision allowed the commonwealth to ask for a verdict of voluntary manslaughter without proving the elements of such a crime. This was possible because the jury in the first trial had the power under Pennsylvania common law to convict defendant of voluntary manslaughter on a murder indictment, though the evidence was insufficient to show provocation, since the lesser crime is part of the greater.[1] Pennsylvania precedent had already established that "in such cases the jury is not bound to accept the version of either the commonwealth or that of the defense, but must determine from the evidence what the true situation was at the time of the homicide."[2] However, *Commonwealth v. Kellyon* had held that, although instructed that there is no evidence of mitigating circumstances, a jury still has the power to return voluntary manslaughter.[3] And on defendant's appeal from conviction of the lesser crime, though there was no instruction on voluntary manslaughter, the court continued to follow these principles:

> [W]hile in view of the evidence, the verdict of voluntary manslaughter is difficult to understand, such a verdict is strictly within the jury's prerogative, and may be returned even in the absence of evidence of sufficient provocation and passion if the evidence as a whole is sufficient to warrant defendant's conviction of murder.[4]

The court again recognized this jury power in a case subsequent to the second *Frazier* case, but said that where there was no proof of killing under the influence of passion or provocation, then it is not

[1] Commonwealth v. Frazier, 411 Pa. 195, 191 A.2d 369 (1963); Commonwealth v. Nelson, 396 Pa. 359, 152 A.2d 913 (1959); Commonwealth v. Steele, 362 Pa. 427, 66 A.2d 825 (1949).

[2] Commonwealth v. Steele, 362 Pa. 427, 66 A.2d 825 (1949).

[3] 278 Pa. 59, 122 Atl. 166 (1923).

[4] 420 Pa. 209, 216 A.2d at 337.

error to fail to give an instruction on voluntary manslaughter.[5] Collateral to the jury's power to convict of a lesser crime is the principle that such a conviction implicitly acquitted defendant of the greater crime of murder.[6] This prevented defendant from twice being in jeopardy for the same offense.[7] There was, then, no issue of double jeopardy since defendant was retried for manslaughter, not murder.

The commonwealth, limited in the second trial to voluntary manslaughter, was forced to prove that charge without evidence of provocation, or else release the defendant.[8] However, the court reasoned that a reversal because of erroneous instructions should not permit defendant to be released on demurrer. The court said public policy demanded that a technicality not defeat "the underlying and basic principle of criminal law, *i.e.*, the protection of society . . ." from "this man whom the commonwealth's evidence shows is a dangerous criminal."[9] And, further, "the law is not and should not be so foolish as to unqualifiedly release and free without acquittal by a jury, a person indicted for homicidal manslaughter whom the evidence proved was guilty of murder."[10] Thus the present *Frazier* decision adopts the rule of other jurisdictions that on retrial, where prosecution for the greater offense is barred by past acquittal, the defendant may and should be convicted of the lesser offense, even if the evidence justifies only a conviction of the higher.[11]

Such a principle of law is a definite exception to established crim-

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[5] Commonwealth v. Pavillard, 421 Pa. 571, 220 A.2d 807 (1966). The court said this was consistent with the second *Frazier* case, but the dissent argued that unless an instruction for voluntary manslaughter was always given the jury would not know it had that power.

[6] Where defendant requests correction of error in the first trial, he waives his constitutional protection against double jeopardy, but such waiver "goes no further than the accused himself extends"; he asks only a "correction of so much of the judgment as convicted him of guilt." Commonwealth v. Dietrick, 221 Pa. 7, 70 Atl. 275, 279 (1908). See also Green v. United States, 355 U.S. 184 (1957); Commonwealth v. Flax, 331 Pa. 145, 200 Atl. 632 (1938); Commonwealth v. Gabor, 209 Pa. 201, 58 Atl. 278 (1904). Fifteen states have this rule, but seventeen states hold the first verdict an entirety which can only be displaced *in toto*, allowing retrial on the higher charge also. Annot., 61 A.L.R.2d 1141, 1146 (1958).

[7] "Any different rule than that indicated here would, as we view it, be a serious impairment of a defendant's right to immunity from a second trial for the same offense, when a jury of his peers in a proper judicial proceeding has once found him not guilty." Commonwealth v. Dietrick, 221 Pa. 7, 70 Atl. 275, 279 (1908).

[8] "There was ample evidence of murder, but no evidence of passion." Commonwealth v. Frazier, 216 A.2d 337, 338 (1966). This problem does not arise in the seventeen state jurisdictions which allow retrial of the higher charge. See Annot., 61 A.L.R.2d 1141 (1958).

[9] 420 Pa. 209, 216 A.2d at 339.

[10] *Ibid.*

[11] Annot., 61 A.L.R.2d 1141, 1147, 1169 (1958); 42 C.J.S. *Indictments & Information* § 299 (1964).

inal procedure which prevents retrial of a person who has been acquitted of a given crime.[12] It is a matter of basic procedure that the state always bears the burden of proving the existence of every element necessary to constitute the crime charged; "and if the proof fails to establish any of the essential elements . . . the defendant is entitled to an acquittal."[13] Of course, the re-use of the original evidence to prove the lesser crime is allowed, but the requirements of proof must still be satisfied. The appeal here was granted from the conviction of manslaughter, all higher crimes being disposed of by acquittal, and the retrial concerned only the charge of manslaughter. That the proof of guilt was probably discharged by the commonwealth in the first trial was not sufficient reason to depart from the requirements of proof in the second trial. Otherwise, the defendant is deprived of the benefit of his acquittal of murder.[14] The commonwealth should not be allowed to go to the jury and say that, although the defendant has been acquitted of murder and cannot be punished for that offense *eo nomine*, yet, if they believe from the evidence he did commit murder they may call it manslaughter and punish him for that offense.[15] While this does not violate principles of double jeopardy, it amounts to a retrial of murder. Does not this violate concepts of due process?

The court was concerned with the prospect of allowing a criminal to go free solely because of an inconsistency in procedure,[16] but the public interest is better served by requiring proof of an indictment. There is a conflict between public safety and one individual's rights, but the latter represents our society's concepts of fundamental justice which must transcend the circumstances of a particular case. The court should not depart from the principle of *Dietrick*[17] in treating a verdict of the lesser crime as being a complete acquittal of the greater. But instead, the court should restrict the rule[18] which allows complete exercise of jury equity, and only allow the jury to return a verdict of the lesser crime if there is some evidence to support it. If the presumption of innocence of murder has not been overcome, acquittal is in order.

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[12] See Commonwealth v. Dietrick, 221 Pa. 7, 70 Atl. 275, 279 (1908).

[13] Commonwealth v. Dietrick, 218 Pa. 36, 66 Atl. 1007 (1907); 20 AM JUR. *Evidence* § 149 (1939).

[14] Parker v. State, 22 Tex. Ct. App. R. 105, 3 S.W. 100, 103 (1886).

[15] *Ibid.*

[16] Because the jury was allowed to return manslaughter where there was no evidence of mitigating circumstances, the state had no evidence to prove provocation in the second trial.

[17] 221 Pa. 7, 70 Atl. 275 (1908).

[18] Commonwealth v. Pavillard, 421 Pa. 571, 220 A.2d 807 (1966); Commonwealth v. Kellyon, 278 Pa. 59, 122 Atl. 166 (1923); Commonwealth v. McMurray, 198 Pa. 51, 47 Atl. 952 (1901).